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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

EX PARTE OR LATE FILED

Re: ***Ex Parte***
CC Docket No. 96-98

Dear Ms. Salas:

In this letter, Cbeyond Communications ("Cbeyond") reviews, and applies the statutory "impair" standard as described by the Commission in the *UNE Remand Order* to[1] the information in the record concerning the need for access by competitive local exchange carriers ("CLECs") to unbundled switching. This analysis shows that under that statutory standard the Commission may not expand the scope of the availability of unbundled switching. Cbeyond reiterates its support for the proposal by Allegiance recently submitted in this proceeding.[2]

Unbundling Analysis

The Commission in the *UNE Remand Order* conducted an extensive analysis of whether a carrier is impaired without access to unbundled local circuit switching. The Commission did not limit its unbundling analysis to considerations of cost, timeliness, ubiquity and quality factors, but also looked at "the totality of circumstances and marketplace developments."[3] The Commission's goal was to:

> [d]evelop an administratively simple rule that reflects marketplace developments and provides certainty to market participants. We seek to adopt a rule that serves as a reasonable proxy for when competitors are indeed impaired in their ability to provide the services they seek to offer.[4]

1 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (1999)("*UNE Remand Order*").

2 CC Docket 96-98, *Ex Parte Letter* from Counsel for Allegiance Telecom, Inc. to Magalie R. Salas, FCC, at p. 1 (Jan. 30, 2001)("Allegiance January *Ex Parte*").

3 *UNE Remand Order* at ¶ 276.

4 *Id.*

The Commission described its unbundling analysis in the following manner:

> [w]e do not limit our analysis to the cost, timeliness, ubiquity, and quality factors described above. Rather, we look at the totality of circumstances and marketplace developments when considering whether a requesting carrier is impaired without access to unbundled local circuit switching. In addition to examining where requesting carriers have deployed switches, we look to the marketplace to see which customers are receiving service from facilities-based competitors. To the extent the market shows that requesting carriers are not serving a market segment with self-provisioned switches, we find that it is probative evidence that for a discrete market segment requesting carriers are impaired without access to unbundled local circuit switching. Conversely, to the extent that the market shows that requesting carriers are generally providing service in particular situations with their own switches, we find this fact to be probative evidence that requesting carriers are not impaired without access to unbundled local switching.[5]

Consideration of the factors the Commission has previously evaluated in crafting its unbundling determination leads to the conclusion that CLECs are not impaired in providing services to business customers in MSAs where four or more CLECs have deployed switches, provided the ILEC provides nondiscriminatory access to the EEL.

Alternatives Outside the Incumbent's Network. The Commission has primarily looked at two factors in determining whether there are alternatives outside the ILEC's network. One is the number of CLEC switches deployed; the other is whether self-provisioning of switches is economically viable in the long run.[6] In regard to the deployment of CLEC switches, the record in this proceeding has demonstrated that the number of CLEC switches is dramatically increasing across MSAs in general, not just the top 50 MSAs. SBC has 40 of the top 100 MSAs in its region, and in 35 of those MSAs, there are at least four switches.[7] Twenty of SBCs MSAs are in the top 50 MSAs, and there are at least four CLEC switches in each of those MSAs.[8] In 19 of these 20 MSAs, there are at least nine CLEC switches.[9] Verizon has noted that in many rate centers in its region which are outside the top 50 MSAs, CLECs have deployed four or more switches.[10] For instance, every rate center in the Wilmington-Newark Delaware MSA is served by at least four CLEC switches, with some rate centers served by as many as 12 CLEC

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5 *UNE Remand Order* at ¶ 276.
6 *UNE Remand Order* at ¶¶ 254-256.
7 Transcript at 23.
8 *Id.*
9 *Id.* at 34.
10 CC Docket No. 96-98, Bell Atlantic Petition for Reconsideration and Clarification at pp. 9-11 (Feb. 17, 2000) ("Verizon Petition").

switches.[11] In the Lowell, Massachusetts MSA, the Lowell rate center is served by 17 CLEC switches, and the Billerica rate center is served by 10 CLEC switches.[12] These are but a few of the numerous examples Verizon cites. Not only are these examples of the aggressive deployment of CLEC switches, these are instances of where unbundled local switching is currently required even though clearly CLECs are not impaired without access to unbundled switching.

The increasing deployment of CLEC switches in areas beyond the top 50 MSAs is evidence that it is becoming economically viable for CLECs to provision switches in those areas. In 1999, the FCC deemed "it too early to know whether self-provisioning is economically viable in the long run."[13] The intervening two years have demonstrated that in certain geographic areas it is economically viable to self-provide switches and that those areas are not limited to the top 50 MSAs. One factor the Commission examined in determining the financial viability of the self-provisioning of switches was whether the CLECs deploying switches were generating income. The Commission looked at how many were "EBITDA positive."[14] Allegiance has demonstrated in the record of this proceeding that it is economically viable for CLECs to self-provide switches. Of the 26 markets in which it was operating in November 2000, Allegiance was EBITDA positive in four of them, and expected to be EBITDA positive or at a cash-flow break even point in four more markets by the end of the year.[15] Allegiance found that it is nearing the break-even point in markets in about 20 months.[16]

The viability of providing switches in MSAs is reflected in the market-entry strategies of new CLECs. For instance, Cbeyond is choosing not to enter the market through a resale or UNE-P strategy, but will instead utilize its own switching facilities and not rely on the switching facilities of the ILECs.[17] Cbeyond can do this because of a combination of pure IP network architecture and soft-switch technology that will bring all the communications services that its target market, *i.e.*, small business customers, needs at affordable prices previously only available to large business customers.[18] Even Birch Telecom, a strong proponent of extending unbundled switching requirements, admits that we are "on the cusp of a new generation of switching technology" that will allow CLECs to provide fully integrated voice and data over new facilities.[19] Birch, however, has chosen to transition to this stage using resale and UNE-P as an entry strategy.[20] The way a CLEC enters a market is most certainly its prerogative. Cbeyond,

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11 *Id.*
12 *Id.*
13 *UNE Remand Order* at ¶ 256.
14 *Id.* at ¶ 256, n. 500.
15 Transcript at 19.
16 *Id.*
17 CC Docket No. 96-98, *Ex Parte* Letter from Counsel for Cbeyond Communications, Inc. to Magalie R. Salas, FCC, at 1 (Dec. 21, 2000) ("Cbeyond December *Ex Parte* Letter").
18 *Id.* at p. 2.
19 Transcript at 56.
20 *Id.*

and other facilities-based CLECs, have shown that switch deployment is both practical and economical. Moreover, the Commission has stated it will not evaluate impairment based on a particular business plan. The Commission noted:

> [w]e favor an analytical approach that considers the totality of the circumstances a requesting carrier will face, rather than a specific case analysis, to determine whether a lack of access to particular network elements materially diminishes a requesting carrier's ability to provide the services it seeks to offer. Adopting a business case analysis approach would require the Commission to conduct a detailed analysis of the profitability of entry for a representative firm using various business strategies in each possible market.[21]

The U.S. Supreme Court has held that in conducting its impairment analysis, the Commission "cannot consistent with the statute, blind itself to the availability of elements outside the incumbent's network."[22] The Court added that an entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has not "*ipso facto* been 'impaired' in its ability to provide the services it seeks to offer."[23] The reality of the market is that in MSAs where CLECs have deployed four or more switches, self-provisioning has been shown to be a viable entry strategy, and the Commission cannot blind itself to that reality simply because it does not accord with some CLEC business plans.

Cbeyond demonstrates below how this new switching technology will allow CLECs to reach a larger market segment at lower prices. Thus, for purposes of an evaluation of alternatives outside the ILEC network, the record shows that self-provisioning of switches is economically viable, and will continue to become more economically viable in the near future.

Cost In regard to cost, the Commission has noted that "the most critical aspect of our "impair" analysis is not the costs of purchasing a local circuit switch, but rather the economies of scale that may characterize local circuit switching and the additional costs that requesting carriers incur when placing their self-provisioned switches into operation."[24] An analysis was conducted into CLEC network architecture. The analysis found the following:

> CLECs, unencumbered by an embedded architecture, typically enter the market with a distributed network architecture that substitutes longer transport routes for multiple switches and outside plan facilities while at the same time providing origination/termination services within geographic areas comparable to those served by ILEC tandems. Though CLECs generally don't deploy stand-alone Class 5 (end office) and Class 4 (tandem) switches, their distributed network

21 *UNE Remand Order* at ¶ 257.
22 *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 389 (1999).
23 *Id.*
24 *UNE Remand Order* at ¶ 259.

> architecture provides similar origination and termination services across comparable geographic areas. By utilizing SONET nodes collocated in multiple ILEC central offices, CLECs often are able to serve a customer base spread across an entire state or LATA using a single, integrated end office and tandem switching platform. The cost advantages of this architecture are that it minimizes the amount of switching investment required to serve a disaggregated customer base, both by minimizing the number of class 5 local switches required as well as reducing the need for a stand-alone tandem switch. However, the downside is that this network architecture requires additional investments in transport, collocation and SONET nodes.[25]

WorldCom has noted how this network architecture allows it "to access and serve a large geographic area from a single switch."[26] Intermedia noted how its "very sophisticated and capable switches" allow it to combine many functions and to cover a very large area.[27] This accords with the information placed in the record by Cbeyond as to the capabilities of the switching technology it plans to use.[28]

The Commission has recognized that the switches deployed by CLECs "may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies."[29] The Commission, however, was concerned "that switch capacity, distance-sensitive transport costs, and collocation costs significantly impair a requesting carrier from fully exploiting this market entry strategy."[30] However, as one CLEC has noted, "the advent of relatively inexpensive fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of switch/transport have changed."[31] Any lingering concerns the Commission has about the cost and delay associated with obtaining collocation could be addressed, as Allegiance suggested, by adding a second prong to the four CLEC switch standard that would require that at least 50% of the serving wire centers in a MSA have four or more collocated CLECs.[32] The cost of self-

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[25] CC Docket Nos. 96-262 and 94-1, CCB/CPD File No. 98-63, ALTS Reply Comments, Attachment A, Intergrated Communications Corporation, *Interstate Switched Access Charges, A National Survey: A Public Policy Analysis of Interstate Switched Access Charges, Including a Survey of 1,435 Incumbent Local Exchange Carrier Tariffed Rates* at p. 6 (October 29, 1999) ("ICC Report")

[26] CC Docket No. 96-98, *Ex Parte Letter* from BellSouth to Magalie R. Salas, FCC, Attachment 3 at p. 3 (Feb. 21, 2001)(BellSouth cites WorldCom testimony from a Georgia proceeding).

[27] *Id.* at p. 4 (BellSouth cites Intermedia testimony in Florida and Alabama).

[28] *See* Cbeyond December *Ex Parte*.

[29] *UNE Remand Order* at ¶ 261.

[30] *Id.*

[31] BellSouth February *Ex Parte*, Attachment 3 at p. 2 (BellSouth cites testimony of ICG Telecom Group, Inc. in North Carolina and Louisiana).

[32] Allegiance January *Ex Parte* at pp. 7-8.

provisioning switches is certainly a more surmountable factor today and the statistics bear this out.

This is not to say, however, that it is now feasible for CLECs to serve every geographic region. It appears from the statistics cited by ILECs that most CLEC switches are still located within a MSA. This makes sense as the number of customers within a MSA will make it feasible to serve customers within that MSA even if they are dispersed. Once CLECs move beyond a MSA, however, there will be a smaller pool of customers from which the CLECs can draw to recover the costs of these facilities. The level of utilization rates will be lower in rural areas.[33] In rural areas with the lower population densities, CLEC customers will be more spread out.[34] CLECs operating in those areas will likely have customers that are located at larger distances from their switches.[35] CLECs will have to incur higher transport costs to service these customers. Thus, for CLECs the MSA will be the region where their costs of self-provisioning switches will be somewhat lower because they will have higher utilization rates and shorter distances from end user locations to the switches. It is when the CLEC begins to move beyond the MSA that it finds its costs increase. As this Commission has noted, requesting carriers that serve dense areas are able to make more efficient use of their switching facilities, and can thus better counter incumbent LEC scale economies.[36] Accordingly, a consideration of cost factors shows that CLECs are not impaired by the unavailability of unbundled switching.

<u>Timeliness and Ubiquity</u>. In considering this factor, the Commission has primarily considered the time it takes for the CLEC to enter a market. The Commission determined that "the total amount of time required to purchase, install, turn up a switch, and obtain collocation, as well as the amount of time needed for incumbent LECs to complete coordinated loop cutovers" imposes a "material delay" on CLECs that self-provision their own switches.[37] Allegiance commenced operations in August 1997, and at the start, it did take some time to enter the market. It took eight months for Allegiance to perform its first coordinated loop cutover.[38] Since then, however, Allegiance has been able to move quickly into major markets. It is operating currently in 26 of the top 50 MSAs, and by the end of this year, expects to be in another 10 MSAs.[39] Cbeyond is proof positive of the timely manner in which CLECs can now enter markets. Cbeyond was founded in the Fall of 1999 and has already begun to offer service in Atlanta.[40]

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33 *See,* Rural Task Force, *White Paper 2: The Rural Difference* at p. 44 (January 2000)("*White Paper 2*")

34 Rural carriers face higher costs associated with serving a widely dispersed population base. *White Paper 2* at p. 30.

35 Rural carriers generally utilize longer loops and have higher operating expenses per customer. *White Paper 2* at p. 43.

36 *UNE Remand Order* at ¶ 288.

37 *Id.* at ¶ 267.

38 Transcript at 16.

39 *Id.*

40 Cbeyond December *Ex Parte* at 1-2.

The time frame for CLECs to enter particular markets has certainly reduced. For instance, the new collocation provisioning time frames implemented by the Commission will help ensure that CLECs obtain collocation in a timely manner. The time for ILECs to provide coordinated loop cutovers should also reduce as more and more states implement provisioning intervals for hot cuts. The Commission could also do a lot to further this end by implementing national provisioning intervals.

Goals of the Act. The Commission found that its approach to unbundling local circuit switching will preclude residential and small business consumers from having to wait unnecessarily for competitive alternatives.[41] The Commission found that "granting requesting carriers access to unbundled switching will allow these carriers to serve customers in areas where traffic volumes and customer densities make it difficult initially to justify deploying a switch."[42]

The intervening eighteen months, however, has shown that the small business market should no longer be considered together with the residential market as CLECs have been providing competitive services to this small business market segment, and are providing this service through use of their own switching facilities. Allegiance targets primarily small and medium-sized businesses. 87% of its customers have fewer than 10 lines.[43] 32% of its customers have one or two lines.[44] Cbeyond also will target small to medium-sized businesses.[45]

The gains made by facilities-based CLECs in the small business market has been corroborated by ILEC statistics. Verizon has experienced significant business line losses among customers of all sizes, but particularly with those between 3 and 11 lines.[46] Line losses via number porting or resale has occurred for all small and medium sized business customers and "substantially exceeds the total number of lines using UNE-P."[47] Even in Verizon states with minimal or no UNE-P arrangements, Verizon has experienced significant small and medium business line losses to CLECs.[48] In Verizon areas, the UNE-P is overwhelmingly used for the residential mass market (93% of UNE-P is residential, 5.7% is business and 1.3% is coin).[49] BellSouth also provided evidence in this proceeding that the number of its small business

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41 *UNE Remand Order* at ¶ 273.

42 *Id.*

43 CC Docket No. 96-98, *Ex Parte* Presentation of Allegiance Telecom, Inc., at 2 (November 21, 2000).

44 Allegiance January *Ex Parte* at 3.

45 Cbeyond December *Ex Parte* at 1.

46 CC Docket No. 96-98, *Ex Parte* Letter from Verizon Communications to Magalie R. Salas, FCC, at 1 (Dec. 21, 2000) ("Verizon December *Ex Parte*").

47 *Id.*

48 *Id.*

49 *Id.*

customers discontinuing service with BellSouth greatly exceeds the number of UNE-P arrangements in service for all classes of business customers, both small and large.[50]

Thus, the small business market is being served by carriers utilizing switches. Carriers serving this market segment are not impaired without access to unbundled switching. Unbundling switching for this market segment in MSAs where CLECs have deployed four or more switches is no longer needed to further the goals of the Act, and more importantly, the elimination of such a requirement would allow the Commission to remain true to another goal of the Act -- the promotion of ***facilities-based*** competition.

Therefore, under the statutory "impair" test, the Commission may not lawfully expand, and should decrease, the availability of unbundled switching. For all the reasons discussed above, CLECs are successfully deploying their own switches to serve customers and are not impaired without access to unbundled switching.

The Commission Should Adopt the Allegiance Proposal

Allegiance has proposed that the Commission find that CLECs without access to unbundled local switching are not impaired in their ability to serve any business customers in any metropolitan statistical areas in which four or more CLECs have deployed switches, provided that the ILEC provides nondiscriminatory access to the enhanced extended link ("EEL"). The case for the Allegiance proposal has already been extensively laid out in previous filings.[51] Here, Cbeyond highlights some of the significant points in favor of adoption of the Allegiance proposal.

Geographic Areas. The Allegiance proposal would expand the carve-out to all MSAs in which CLECs have deployed four or more switches. The record demonstrates that reliance on density zones arbitrarily excludes many rate centers that are served by a significant number of CLEC switches.[52] The access zones were never developed for purposes of identifying areas where competing carriers were deploying their own switches, and, in fact, do a particularly poor job of reflecting where CLECs have deployed switches.[53] For instance, rate centers that are served by as many as 19 CLEC switches include areas outside of Zone 1, and, thus, are subject to unbundled switching requirements under the current rule.[54] 83% of Verizon rate centers in the top 50 MSAs do not qualify for unbundling relief because they do not include zone 1 access

[50] CC Docket No. 96-98, *Ex Parte* Letter from BellSouth to Dorothy Atwood, Chief of Common Carrier Bureau, at 1 (Feb. 23, 2001) (BellSouth February *Ex Parte*") citing *Ex Parte* Letter from BellSouth to Magalie R. Salas, FCC (November 30, 2000).

[51] Allegiance January *Ex Parte*; CC Docket No. 96-98, *Ex Parte* Letter from Counsel for Cbeyond to Magalie R. Salas, FCC (February 7, 2001) ("Cbeyond February *Ex Parte*).

[52] *See* Allegiance January *Ex Parte* at 5.

[53] Verizon Petition at p. 8.

[54] *Id.*

areas.[55] Other ILECs have reported similar failures of the zone approach to identify accurately areas where CLECs need access to unbundled switching.[56]

The MSA approach is more in accord with CLEC operations as most CLECs base entry strategies on MSAs.[57] A CLEC with access to collocation and the EEL can use a single switch to serve an entire MSA. This further supports a MSA approach.[58] In addition, the Commission has observed that a CLEC, in an effort to decrease per-customer costs, could target a substantial number of business/residential customers in a MSA.[59] The Commission also found a MSA to be a "reasonable entry market because number portability is deployed on a MSA basis, and [is] available to serve a requesting carrier's customers within these areas."[60] Thus, the MSA approach is more suitable as the scope of the geographic area for the carve-out. For the reasons noted above, this should not be limited to the top 50 MSAs.

<u>Residential/Business Split</u>. The Commission previously concluded that without access to unbundled local switching, requesting carriers were impaired in their ability to serve the mass market.[61] For this reason, the Commission sought to differentiate between the mass market and medium and large-sized businesses by providing unbundled access to local switching for requesting carriers when they serve customers with three lines or less.[62] The Commission recognized that this would include some small business customers, but felt that this inclusion would further the goals of the Act as described above. As Cbeyond has shown, this inclusion of the small business market segment with the residential market is no longer warranted. Both Allegiance and Cbeyond will be serving business customers with fewer than four lines using their own switches.[63] Both SBC and Verizon have provided evidence that the largest number of hot cuts they perform are for small business customers that are migrating to CLEC switches.[64] 80% of the hot cuts Verizon performs are for customers with fewer than 3 lines.[65] From March to May 2000, 59% of Southwestern Bell Telephone's hot cuts were for customers with one line; 12% were for customers with two lines; and 8% were for customers with three lines.[66] Clearly there is entry by facilities-based competition in the small business segment of the market.

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55 *Id.*

56 Transcript at pp. 5-7.

57 Allegiance January *Ex Parte* citing *UNE Remand Order* at ¶ 80.

58 Allegiance January *Ex Parte* at p. 5.

59 Allegiance January *Ex Parte* at p. 6, *citing UNE Remand Order* at ¶ 80.

60 Allegiance January *Ex Parte* at p. 6, *citing UNE Remand Order* at ¶ 80 n. 140.

61 *UNE Remand Order* at ¶ 291.

62 *Id.* at ¶ 293.

63 Allegiance January *Ex Parte* at 2; Cbeyond February *Ex Parte* at 1. The ITU's recent agreement on standards for SHDSL will permit Cbeyond to serve customers that currently subscribe to only one line. CC Docket 96-98, *Ex Parte Presentation* of Cbeyond Communications, Inc. at 1 (Feb. 22, 2001).

64 Allegiance January *Ex Parte* at p. 3.

65 Verizon September *Ex Parte* at 4.

66 CC Docket No. 96-98, *Ex Parte* Presentation of SBC Telecommunications, Inc. at 2 (July 12, 2000).

This data coupled with the showing above that the vast majority of CLEC customers served by unbundled local switching are residential demonstrates that the residential/business split is the appropriate demarcation for unbundling switching. If a CLEC has a switch and a collocation arrangement there is no reason not to use the facilities to service small business customers regardless of the number of lines. The higher revenues for business lines as opposed to residential lines would justify the cost of the coordinated loop cutover and the transport costs.[67] The data showing the prevalence of facilities-based competition in the small business market corroborates this.

A residential/business split has administrative advantages. For example, in contrast to line counts, it would preclude the situation where a non-facilities-based carrier must lose a customer when a customer increases from three lines to four lines.[68] In addition, it eliminates the need to police the number of lines a particular customer has.

The Commission should reject any requests to base the availability of unbundled switching on the point at which a CLEC converts a customer to a DS-1 facility. Because the economics and practical considerations governing what services can be provided over DS-1 facilities is changing rapidly, any attempt to identify the number of lines that can be served over a DS-1 would be obsolete as soon as it is adopted. The PACE Coalition ("PACE") approximates the DS-1 equivalent line count at 20 lines which is far above the level at which Allegiance provides a DS1 conversion, *i.e.*, 8-12 lines.[69]

Cbeyond has noted that new technical standards will allow it to soon serve customers with fewer than four lines with digital facilities.[70] Thus, a delineation of the medium and large business market based on line counts is rapidly losing any meaning. As previously noted by Cbeyond in this proceeding, Cbeyond will access its customers through DS1 unbundled local loops and EELs.[71] Using soft switch technology, DS1 loops and EELs can be configured to provide anywhere from one to several lines as well as high-speed data connectivity, at a price that allows CLECs a meaningful opportunity to compete. In this environment, there is no meaningful way to identify the medium and large business market based on lines because it is possible to serve them as well as small businesses with the same switching technology with either one or multiple lines. As "next generation" CLECs utilize technologies that provide greater network efficiency, they will have the ability to provide small businesses with more lines for the same price they are currently paying today. The resulting line growth will increase the administrative burden and make it impossible to delineate the small business component of the mass market. Accordingly, there is no basis in the current record for a finding that the current

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67 *See* Transcript at pp. 41, 61.
68 Allegiance January *Ex Parte* at p. 4.
69 Transcript at pp. 17-18.
70 *See* fn. 68 *supra.*
71 Letter from Cbeyond to Magalie Roman Salas, CC Docket No. 96-98, December 21, 2000.

three line test provides an adequate delineation of the mass market or that unbundled switching is necessary to serve customers of three lines or less.

The proposed residential/business split provides a far better delineation of the mass market that CLECs might be impaired in serving without access to unbundled local switching. This approach is more consistent with the Commission's previous attempts to delineate the medium and large business market. To the best of Cbeyond's knowledge, the Commission has never delineated that market based on four or more lines. For example, in the *Access Reform Proceeding*, the FCC determined that multi-line, *i.e* more than one line, constituted the medium and large business market.[72] Thus, the proposed residential/business split is closer to the previous Commission determination of the medium and large business market than is the present three line test. Accordingly, the Commission should adopt a business/residential split, rather than a three line test, in order to identify the market for which CLECs may require access to unbundled switching.

EELs Requirement. Cbeyond fully endorses the proposed retention of the availability of the EEL as a condition of the switching carve out. In the *UNE Remand Order*, the Commission concluded that requesting carriers are not impaired in certain circumstances without access to unbundled local switching provided that the EEL is available.[73] The Commission found that the EEL diminishes the cost of collocation because the EEL allows requesting carriers to aggregate loops at fewer collocation locations and to increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities to their central location.[74] This, in turn, can significantly reduce the costs of deployment in the initial phase of an entry strategy.[75]

Cbeyond's business plan verifies the finding of the Commission in the *UNE Remand Order* concerning the need for the availability of the EEL. Cbeyond will access its customers through DS1 unbundled local loops and through EELs aggregate traffic at a single location serving an MSA. Without the EEL, Cbeyond would be impaired in its ability to provide service because it would need numerous additional collocation arrangements which in turn would limit the availability of funds for investment in switches. This is precisely the strategy and circumstance that the Commission contemplated for a new market entrant in the *UNE Remand Order*. Nothing in the record suggests that the Commission should alter its determination concerning the availability of the EEL as a condition of the switching carve out. Moreover, as Cbeyond has demonstrated, there is no basis for a finding that the EEL requirement could be

72 *Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997), aff'd sub nom. *Southwestern Bell Tel Co. v. FCC*, __ F. 3d __ (8^{th} Cir., August 19, 1998); Second Order On Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 (1997)(distinguishing between primary residences and multi-line business customers).

73 *UNE Remand Order*, para. 288.

74 *Id.*

75 *Id.* para. 289.

eliminated because the Commission has permitted CLECs to convert special access service to the EEL.[76]

Conclusion

The record on reconsideration of the *UNE Remand Order* shows that CLECs are not impaired in providing service to customers without access to unbundled switching because CLECs are currently provisioning their own switches and serving customers with fewer than four lines. Accordingly, the Commission could not, on the current record, rationally or lawfully conclude that it needs to expand the availability of unbundled switching under the statutory impairment standard. The Commission should adopt the Allegiance proposal.

Sincerely,

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76 Cbeyond February *Ex Parte* at 3-4.